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No. 89-457

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BILLY MCCLURE and EFFIE MCCLURE,
Petitioners,

vs.

JEFFERSON ARMS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the
Missouri Court of Appeals, Eastern District

BRIEF OF RESPONDENT JEFFERSON ARMS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	iv
Reasons for Denying the Petition	1
I. THE PETITION FOR WRIT OF CERTIORAI SHOULD BE DENIED BECAUSE PETITIONERS HAVE FAILED TO SPECIFY THE PARTICULARS, IF ANY, CONCERNING EARLIER PROCEEDINGS ON A FEDERAL QUESTION INVOLVING THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION..	2
II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS CAN NOT RAISE FOR THE FIRST TIME ON A WRIT OF CERTIORARI A FEDERAL CONSTITUTIONAL CHALLENGE WHICH WAS NEVER RAISED, PRESERVED, OR PASSED UPON IN THE STATE COURTS BELOW.....	3

III. NOTWITHSTANDING PETITIONERS' FAILURE TO RAISE THEIR FEDERAL CONSTITUTIONAL QUESTION IN THE STATE COURTS BELOW, THE DECISION OF THE EASTERN DISTRICT OF THE MISSOURI COURT OF APPEALS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY HOLDING THAT A LIQUOR LICENSEE WHO ACTS IN THE CAPACITY OF A SOCIAL HOST IS NOT SUBJECT TO DRAM SHOP LIABILITY..... 5

A. Petitioners Did Not Submit Their Cause Of Action To The Jury On A Theory Premised On A Violation Of Section 311.310, R.S.Mo. 1978. 5

B. The Decision Of The Eastern District Of The Missouri Court of Appeals Did Not Rest On A Construction Of Section 311.310, R.S.Mo. 1978, But On Common-Law Principles Prohibiting The Imposition Of Dram Shop Liability On A Social Host. 6

C. The Issues Before The Eastern District Of The Missouri Court Of Appeals Are Unique And Not Likely To Arise Again . 6

Conclusion 7

Appendix A

The opinion of the Eastern District of the Missouri Court of Appeals in *McClure v. McIntosh*, 770 S.W.2d 406 (Mo.App. 1989)[1] A-1

Appendix B

Petitioners' Verdict Directing Instruction B-1

Appendix C

Section 537.053, R.S.Mo. 1986 ..... C-1

[1] The opinion is repeated in respondent's Appendix A because the opinion of the Eastern District of the Missouri Court of Appeals is only partially reproduced in petitioners' Appendix.

TABLE OF AUTHORITIES

	Page
Cases:	
Cardinale v. Louisiana, 394 U.S. 437 (1969)	4
Carver v. Schafer, 647 S.W.2d 570 (Mo.App. 1983)	5,6
Nesbitt v. Westport Square, Ltd., 624 S.W.2d 519 (Mo. App. 1981)	6
Sampson v. W.F. Enterprises, Inc., 611 S.W.2d 333 (Mo.App. 1980)	6
Statutes:	
Section 311.310, R.S.Mo. 1978	2,5,6
Section 311.310, R.S.Mo. 1986	6
Section 537.053, R.S.Mo. 1986	6
Rules:	
Supreme Court Rule 21	1,2,3

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IN THE

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BILLY McCLURE and EFFIE McCLURE,
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JEFFERSON ARMS CORPORATION,
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On Petition for a Writ of Certiorari to the
Missouri Court of Appeals, Eastern District

BRIEF OF RESPONDENT JEFFERSON ARMS CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE PETITION

This case presents no basis to authorize review of the decision of the Eastern District of the Missouri Court of Appeals by Writ of Certiorari. In violation of Supreme Court Rule 21.1(h), petitioners have failed to specify in their Petition at what stage of the state court proceedings a federal question involving the equal protection clause of the Fourteenth Amendment of the United States Constitution was raised. Indeed, petitioners could not because none was raised. In effect, petitioners now attempt to raise a federal constitutional issue for the first time in this Court. This they may not do.

Furthermore, even if petitioners properly raised and preserved a federal constitutional issue in the courts below, no ground for issuance of a Writ of Certiorari exists. Petitioners advance the mistaken proposition that the decision of the Eastern District of the Missouri Court of Appeals involved the interpretation of the Section 311.310, R.S.Mo. 1978. Rather, the court's decision involved the application of common-law principles prohibiting the imposition of dram shop liability on a social host. Resp. App. A-4 to 5. Last, petitioners' position is additionally undermined by the fact that they did not submit their cause of action to the jury on a theory premised on a violation of Section 311.310, R.S.Mo. 1978. Resp. App. B-1.

For these reasons, respondent respectfully requests that this Court deny the Petition for a Writ of Certiorari.

I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS HAVE FAILED TO SPECIFY THE PARTICULARS, IF ANY, CONCERNING EARLIER PROCEEDINGS ON A FEDERAL QUESTION INVOLVING THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

In this case, petitioners seek a Writ of Certiorari from this Court to review the decision of the Eastern District of the Missouri Court of Appeals on the ground that the decision violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. Their Petition for Writ of Certiorari, however, should be denied because petitioners have failed to specify the particulars, if any, concerning earlier proceedings on a federal constitutional question.

Supreme Court Rule 21 governs the contents of a Petition for Writ of Certiorari. Where the Petition invites review of the judgment of a state court, Supreme Court Rule 21.1(h) requires that:

> [T]he statement of the case shall also specify the stage of the proceedings, both in the court of first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way they were passed upon by the court.

Rule 21 further provides that the failure of a petitioner to present in a Petition whatever is essential to a ready and adequate understanding of the points under consideration is a sufficient reason for denying the Petition. Sup.Ct.R. 21.5.

In the present case, petitioners have wholly failed to comply with the mandate of Rule 21. Their Petition for Writ of Certiorari fails to specify at what stage of the proceedings before the courts of the State of Missouri, if any, that a federal constitutional question was raised or passed upon. Indeed, petitioners have not only failed to specify the particulars of their alleged federal constitutional question, but they have also failed to state whether a federal constitutional question was ever raised at all in the courts below. Consequently, since petitioners failed to specify the particulars, if any, concerning earlier proceedings on a federal question involving the equal protection clause of the Fourteenth Amendment of the United States Constitution, their Petition for Writ of Certiorari should be denied.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS CAN NOT RAISE FOR THE FIRST TIME ON A WRIT OF CERTIORARI A FEDERAL CONSTITUTIONAL CHALLENGE WHICH WAS NEVER RAISED, PRESERVED, OR PASSED UPON IN THE STATE COURTS BELOW.

Petitioners argue that a Writ of Certiorari should be issued in the present case because the decision of the Eastern District of the Missouri Court of Appeals purportedly violates the equal protection clause of the Fourteenth Amendment of the United States Constitution. As demonstrated in point one, petitioners

have failed to specify whether a federal constitutional question was ever raised at all in the courts of the State of Missouri. A review of petitioners' appendices shows that no constitutional issues were ever presented. Indeed, the opinion of the Eastern District of the Missouri Court of Appeals, the petitioners' Application for Transfer of Cause from the Missouri Court of Appeals, Eastern District, to the Supreme Court of Missouri, and the ruling of the Supreme Court of Missouri therein are all silent on the question of a federal constitutional challenge premised on the equal protection clause of the Fourteenth Amendment. Absent presentation of such an issue in the courts of Missouri, petitioners cannot raise for the first time on a Writ of Certiorari a federal constitutional challenge which was never raised, preserved, or passed upon in the state courts below.

Justice White for the Court stated the rule as follows:

> . . . [T]he fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the Court will not decide federal constitutional issues raised here for the first time on the review of state court decisions. In *Crowell v. Randell,* 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee,* 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789 [citation omitted] vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion . . . and since. . . .

Cardinale v. Louisiana, 394 U.S. 437, 438 (1969).

Consequently, since the record demonstrates that no federal constitutional question was raised, preserved, or passed upon in the state courts below, none may be raised in this Court. Thus, the instant Petition for Writ of Certiorari should be denied.

III. NOTWITHSTANDING PETITIONERS' FAILURE TO RAISE THEIR FEDERAL CONSTITUTIONAL QUESTION IN THE STATE COURTS BELOW, THE DECISION OF THE EASTERN DISTRICT OF THE MISSOURI COURT OF APPEALS DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY HOLDING THAT A LIQUOR LICENSEE WHO ACTS IN THE CAPACITY OF A SOCIAL HOST IS NOT SUBJECT TO DRAM SHOP LIABILITY.

A. Petitioners Did Not Submit Their Cause Of Action To The Jury On A Theory Premised On A Violation Of Section 311.310, R.S.Mo. 1978.

Petitioners seek to invoke this Court's review of the decision of the Eastern District of the Missouri Court of Appeals on the ground that the decision violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. Their argument focuses on Section 311.310, R.S.Mo. 1978, which petitioners contend created a cause of action in their favor against respondent. However, petitioners did not submit their case to the jury under such a theory. Rather, as evident from their verdict directing instruction, petitioners submitted their case under general principles of common-law negligence as provided in *Carver v. Schafer,* 647 S.W.2d 570 (Mo.App. 1983). Resp.App. B-1.

B. The Decision Of The Eastern District Of The Missouri Court of Appeals Did Not Rest On A Construction Of Section 311.310, R.S.Mo. 1978, But On Common-Law Principles Prohibiting The Imposition Of Dram Shop Liability On A Social Host.

In their Petition for Writ of Certiorari, petitioners attempt to invent a "constitutional" question for review by focusing on Section 311.310, R.S.Mo. 1978. However, the decision of the Eastern District did not involve the statutory construction of Section 311.310, R.S.Mo. 1978. Rather, the Eastern District's opinion relied on common-law principles stated by Missouri courts which provide that liability for injuries caused by intoxicated drivers does not extend to social hosts. Resp.App. A-4-5. Under the facts of this case, the Eastern District held respondent to be a social host and, therefore, not subject to dram shop liability. Resp.App. A-5.

C. The Issues Before The Eastern District Of The Missouri Court Of Appeals Are Unique And Not Likely To Arise Again.

Petitioners' wrongful death action, which was predicated on an action for dram shop liability, arose on October 9, 1982, the date of death of petitioners' decedent. Resp.App. A-2. Since that time, the Missouri General Assembly has enacted a new dram shop liability statute which prohibits dram shop liability in Missouri absent proof that the dram shop keeper has been convicted or received a suspended imposition of sentence pursuant to Section 311.310, R.S.Mo. 1986. Section 537.053.3, R.S.Mo. 1986. Resp.App. C-1. The new dram shop statute also abrogated the decisions in *Sampson v. W.F. Enterprises, Inc.*, 611 S.W.2d 333 (Mo.App. 1980), *Nesbitt v. Westport Square, Ltd.*, 624 S.W.2d 519 (Mo.App. 1981), and *Carver v. Schafer*, 647 S.W.2d 570 (Mo.App. 1983), all cases relied upon by petitioners before this Court. Section 537.053.2, R.S.Mo. 1986. Consequently, the state of the law with respect to dram shop liability

in Missouri has been completely changed since the time petitioners' cause of action arose and the issues presented by their Petition for Writ of Certiorari are unlikely to arise again.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT
DIVISION TWO

No. 54391

BILLY McCLURE, et al.,
Plaintiffs/Appellants,

vs.

WILBERT McINTOSH, et al.,
Defendants/Respondents.

Appeal from the Circuit Court
of the City of St. Louis

Hon. Floyd McBride

OPINION

(Filed: April 11, 1989)

Plaintiffs, Billy and Effie McClure, appeal from orders in favor of Jefferson Arms Corporation granting directed verdict on Count I which was tried on the theory of agency liability and judgment notwithstanding the verdict on Count II which was submitted on the theory of dram shop liability. Richard McClure, the son of Billy and Effie McClure, was killed when struck by an automobile driven by Wilbert McIntosh, an employee of Jefferson Arms. The McClures filed a wrongful death suit against Jefferson Arms and Wilbert McIntosh. A jury returned a verdict against both defendants for $1,000,000. McIntosh did not appeal the judgment against him. The McClures claim the trial court erred in: (1) granting judgment notwithstanding the verdict; (2) excluding the testimony of William McClure, brother of decedent; and, (3) granting the directed verdict on the agency theory. We affirm.

On October 9, 1982, Richard McClure was struck and killed by an automobile driven by Wilbert McIntosh. McIntosh was employed as a maintenance worker by Jefferson Arms. Jefferson Arms is an apartment complex located in downtown St. Louis. On the date of the casualty, McIntosh attended a party permitted or sponsored by Jefferson Arms for employees who installed new boilers at the complex. It was a party to celebrate completion of the work.

The party was held in the basement of Jefferson Arms. The complex operates a lounge. An employee of Jefferson Arms set up a portable bar for the party using liquor from the lounge's storeroom. There was a dispute as to whether Jefferson Arms paid for the alcoholic beverages or if the liquor was paid for through money in an employees' fund. It was undisputed, however, that Jefferson Arms did not charge the employees for alcoholic drinks and generated no financial profit from the party.

McIntosh attended the party for several hours. He consumed several beers while at the party. It is unclear the exact number of beers McIntosh consumed, but several witnesses testified McIntosh fell asleep on a couch during the party. The party ended sometime between 10:00 and 10:30 p.m. After the party, McIntosh and another hotel employee who had also attended the party, Joy Pennebaker, went to a nearby bar and continued drinking. Pennebaker claimed he and McIntosh drank another two or three beers at the bar. McIntosh and Pennebaker left the bar at approximately 11:45 p.m. Pennebaker, who lived in Illinois, needed a ride home and McIntosh agreed to take him home. McIntosh was on Interstate 70 driving Pennebaker home when his car went off the highway onto a pedestrian walkway, struck and killed Richard McClure.

The McClures first claim is there was sufficient evidence to support a claim of dram shop liability against Jefferson Arms and the trial court erred in granting judgment notwithstanding the verdict. The McClures argue that under §311.310 RSMo 1978, in effect at the time of Richard McClure's death, Jeffer-

son Arms is liable for serving the alcoholic drinks to McIntosh at the party. The statute provided it was a misdemeanor for a liquor licensee to "sell, vend, give away or otherwise supply any intoxicating liquor in any quantity whatsoever to . . . any person intoxicated or appearing to be in a state of intoxication . . . ." Section 311.310 RSMo 1978.[1] The McClures claim Jefferson Arms had a common law duty or a duty because of this statute not to furnish alcoholic beverages to McIntosh.

The common law in Missouri after 1981, but prior to enactment of §537.053 RSMo 1986,[2] held a tavern owner may be liable for serving alcoholic beverages to an intoxicated person or to a minor who subsequently struck and killed another. *See, Carver v. Schafer,* 647 S.W.2d 570, 572-75 (Mo. App. 1983); *Nesbitt v. Westport Square, Ltd.,* 624 S.W.2d 519, 520 (Mo. App. 1981); *Sampson v. W.F. Enterprises, Inc.,* 611 S.W.2d 333, 335-37 (Mo. App. 1981). However, liability for injuries caused by intoxicated drivers was never extended to social hosts. *See, e.g., Childress v. Sams,* 736 S.W.2d 48, 49-50 (Mo. banc 1987); *Andres v. Alpha Kappa Lambda Fraternity,* 730 S.W.2d

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[1] This was a criminal statute from which civil liability was derived. *See, Carver v. Schafer,* 647 S.W.2d 570, 575 (Mo. App. 1983). At the time of Richard McClure's death Missouri had no dram shop statute.

[2] This statute prohibits dram shop liability in Missouri except for "any person licensed to sell intoxicating liquor by the drink for consumption on the premises who, pursuant to section 311.310, RSMo, has been convicted, or has received a suspended imposition of the sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person . . . ." Section 537.053.3 RSMo 1986. The Supreme Court of Missouri upheld the constitutionality of the statute in *Simpson v. Kilcher,* 749 S.W.2d 386 (Mo. banc 1988). Section 537.053, however, is inapplicable to this case. The statute became effective September 28, 1985, and the Supreme Court of Missouri has held the statute may not be applied retroactively. *Andres v. Alpha Kappa Lambda Fraternity,* 730 S.W.2d 547, 552-53 (Mo. banc 1987).

547, 553 (Mo. banc 1987) (relying on *Harriman v. Smith,* 697 S.W.2d 219 (Mo. App. 1985)).

In both *Childress,* 735 S.W.2d 48, and *Andres,* 730 S.W.2d 547, the injuries occurred prior to the enactment of §537.053 RSMo 1986. The Supreme Court refused to extend common law liability for injuries caused by intoxicated persons to social hosts. Here, Jefferson Arms did not sell alcoholic drinks to its employees and was, at most, a social host. Jefferson Arms had no intent to profit from the party. It derived no financial benefit from the party, and had no incentive to encourage employees to drink excessively. Jefferson Arms sponsored a party to reward its employees for completing an extensive and costly maintenance job. No commerical motive is evident. McIntosh attended the party voluntarily and not in the course of his employment duties. Even though Jefferson Arms is licensed to sell alcoholic beverages, it provided free drinks for its employees at the party. The beverages were furnished by a social host not a dram shop keeper.

Public policy in Missouri is that it is the consumption and not the furnishing of alcoholic beverages that is the proximate cause of injuries inflicted by intoxicated persons. Section 573.053.1 RSMo 1986. *See also, Spotts v. City of Kansas City,* 728 S.W.2d 242, 249-50 (Mo. App. 1987). The Supreme Court of Missouri in *Andres,* 730 S.W.2d at 553, adopted the reasoning of *Harriman v. Smith,* 697 S.W.2d 219 (Mo. App. 1985), and found that imposing liability upon social hosts would have a substantial impact upon everyday family and social affairs. *Andres,* 730 S.W.2d at 553. In *Childress,* 736 S.W.2d at 49-50, the court found that charging a minimal fee for drinks, but not a fee motivated by intent to generate a profit, did not destroy defendant's role as a social host and therefore did not create liability. *Id.*

We have found no Missouri cases contemplating liabililty of an employer for acts of an employee who becomes intoxicated

at a company sponsored party. However, several other states which, like Missouri, have no social host liability, have held there is no cause of action against employers for casualties involving employees leaving company sponsored parties. *See, e.g., Thompson v. Trickle,* 449 N.E.2d 910, 911-12 (Ill. App. Ct. 1983); *Kuykendall v. Top Notch Laminates, Inc.,* 520 A.2d 1115, 1117-18 (Md. Ct. Spec. App. 1987); *Whittaker v. Jet-Way, Inc.,* 394 N.W.2d 111, 113-14 (Mich. Ct. App. 1986); *Meany v. Newell,* 367 N.W.2d 472, 474-75 (Minn. 1985). *See also, Williams v. United States Fidelity and Guaranty Co.,* 854 F.2d 106, 108-09 (5th Cir. 1988) (applying Mississippi law).

We find Jefferson Arms was, at most, a social host and the trial court properly granted judgment notwithstanding the verdict on the theory of dram shop liability. The trial court ruled that no common law dram shop liability existed at the time of Richard McClure's death and, therefore, Jefferson Arms was not liable for his death. The court relied on *Spotts v. City of Kansas City,* 728 S.W.2d 242 (Mo. App. 1987), which held that dram shop liability established in *Carver v. Schafer,* 647 S.W.2d (Mo. App. 1983), would not be give retrospective effect. The trial court did not comment on the holdings in *Nesbitt v. Westport Square, Ltd.,* 624 S.W.2d 519 (Mo. App. 1981), or *Sampson v. W.F. Enterprises, Inc.,* 611 S.W.2d 333 (Mo. App. 1981), which were decided prior to the date of Richard McClure's death. We find that irrespective of the holdings in these cases, which dealt with liability of dram shops, Jefferson Arms did not sell alcoholic beverages to McIntosh for profit. As a social host Jefferson Arms was not liable for Richard McClure's death. We affirm an order for judgment notwithstanding the verdict if the ruling was proper for any reason, even if the grounds assigned were wrong. *Arthur v. Jablonow,* 665 S.W.2d 364, 365 (Mo. App. 1984). Point denied.

The second claim relates to plaintiffs' agency theory. It asserts the trial court erred in excluding the testimony of decedent's brother, William McClure. The McClures offered the

testimony of William McClure regarding statements made to him after the fact by Susan Moffit, building manager of Jefferson Arms at the time of the casualty. The court prohibited this testimony after finding the McClures had not disclosed the witness, thus violating a discovery request for statements made by any agent or employee of Jefferson Arms. The court acted within its discretion in excluding the testimony.

William McClure went to Jefferson Arms after Richard McClure was killed in an attempt to determine what had happened to his brother. He testified that when he went to Jefferson Arms and asked to speak with McIntosh, "[a] lady came out to me and said that he [McIntosh] wasn't available, that she could help me and her name was Mickey [the building manager]." He testified he then asked her if she knew what happened the night his brother died. Counsel for Jefferson Arms objected at this point, stating that Jefferson Arms submitted interrogatories to the McClures requesting any statements made by any agents or employees of Jefferson Arms about the incident, and that the McClures had denied having any such statements. Counsel for the McClures informed the court that if allowed to testify, William McClure would state the building manager told him: (1) the hotel had a party for its employees; (2) McIntosh got drunk at the party; (3) McIntosh was on duty the evening of the party; and, (4) she asked McIntosh to take Joy Pennebaker, another hotel employee, home from the party. The court found the McClures violated the discovery request and excluded testimony regarding what the building manager may have said to William McClure.

The interrogatory submitted to the McClures read:

> "State whether *you or anyone on your behalf* obtained a statement from any agent or employee of defendant Jefferson Arms Corporation concerning said occurrence and, if so:
>
> A. State the name and address of the person who obtained the statement;

B. State whether such statement was oral, written or recorded.

C. If written or recorded, attach a copy of said statement; if oral, state verbatim the contents thereof." (Our emphasis).

The answer given under oath was, "[n]one."

The McClures contend their son, William McClure, was not acting on their behalf when he questioned the building manager and therefore they were not obligated to include Moffitt's statements when answering the interrogatory. We find the scope of the interrogatory included the statements made by Moffitt to William McClure. The McClures did obtain such statement. The interrogatory was directed to identifying a witness, if any, known to plaintiffs with knowledge of such statements. It is knowledge, not agency, which is operative in the discovery process.

The claim also fails on the agency premise. In *Hilmer v. Hezel,* 492 S.W.2d 395 (Mo. App. 1973) this court addressed the issue of who may qualify as acting "on behalf of" a party when interrogatories are so phrased. In *Hilmer,* the pertinent interrogatory asked, "[d]id the defendant *or anyone on his behalf* obtain a written statement or recording from plaintiff concerning the facts of the occurrence in question?" (Our emphasis). *Id.* at 396. Although an insurer of the defendant had obtained such a statement, defendant replied, "[n]o" to the interrogatory. Defendant claimed the insurer had not acted on his behalf in obtaining the statement.

The *Hilmer* court stated that straining to determine who acted on behalf of the defendant "is an attempt at gamesmanship, contrary to the principle that the purpose of our rules of discovery is to minimize concealment and surprise in litigation." *Id.* at 396. The court found the defendant's insurer fell within the scope of those "acting on behalf" of defendant and exclud-

ed testimony of the insurer since the statements made to the insurer were not answered in the interrogatory.

Here, although William McClure was not a party to the suit, the statements he obtained and conveyed to plaintiffs fell within the scope of the interrogatory. To act on "behalf" of someone is to act for their benefit, support, defense or advantage. BLACK'S LAW DICTIONARY 141 (rev. 5th ed. 1979). William McClure acted for the benefit of his parents. The McClures attempted to use the statements made by Moffitt as evidence of respondeat superior liability of Jefferson Arms. The purpose of the interrogatory was for Jefferson Arms to find out if the McClures were aware of any statements made regarding Richard McClure's death by employees or agents of Jefferson Arms which supported a claim of respondeat superior liability. The McClures withheld their knowledge of a witness who was prepared to testify about statements of the building manager pertaining to whether McIntosh was on duty and acting within the scope of employment by Jefferson Arms at the time of the casualty. These are essential elements of the case and the statements were beneficial to the McClures in establishing liability of Jefferson Arms. Exclusion of this testimony did not preclude the McClures from attempting to establish liability through other evidence.

Whether a party is prejudiced by evasive answers to interrogatories so that exclusion of testimony is proper is a matter left to the discretion of the trial court. *Missouri Highway and Transportation Commission v. Pully*, 737 S.W.2d 241, 245-46 (Mo. App. 1987); *State Highway Commission of Missouri v. Cool's Tall Tower Restaurant and Marina, Inc.*, 654 S.W.2d 224, 226 (Mo. App. 1983). We cannot say the trial court abused its discretion in excluding the testimony.

The last issue is whether there was sufficient evidence to submit a claim of respondeat superior liability, particularly, whether the trial court erred in granting a directed verdict on

this theory. We find there was no evidence to support an agency claim and the court properly granted a directed verdict on the issue.

The McClures only argument in support of the claim of respondeat superior liability is that some states have imposed liability on employers for injuries to third persons caused by an intoxicated employee. No Missouri cases are cited in support of the claim of respondeat superior liability. As discussed earlier, although some states have imposed liability upon employers several other states which, like Missouri, have rejected social host liability, have refused to recognize liability of employers for injuries caused by employees who become intoxicated at employer parties. *See, e.g., Thompson v. Trickle,* 449 N.E.2d 910, 911-12 (Ill. App. Ct. 1983); *Kuykendall v. Top Notch Laminates, Inc.,* 520 A.2d 1115, 1117-18 (Md. Ct. Spec. App. 1987); *Whittaker v. Jet-Way, Inc.,* 394 N.W.2d 111, 113-14 (Mich. Ct. App. 1986); *Meany v. Newell,* 367 N.W.2d 472, 474-75 (Minn. 1985). *See also, Williams v. United States Fidelity and Guaranty Co.,* 854 F.2d 106, 108-09 (5th Cir. 1988). Because Jefferson Arms acted only as a social host of the party it is not subject to liability.

In addition, the evidence does not support a claim of respondeat superior liability. Susan Moffitt, the building manager, testified McIntosh's job did not require him to be on 24 hour call at Jefferson Arms and he was not on duty the night of the casualty. When asked if she instructed McIntosh to take Pennebaker home from the party, she replied, "[a]bsolutely not." There was no evidence McIntosh was acting within the scope of his employment when he drove Pennebaker home and his car struck Richard McClure. Pennebaker, a witness for Jefferson Arms, indicated McIntosh drove him home as a gesture of friendship and not out of McIntosh's employment duties at Jefferson Arms.

Pennebaker testified it was McIntosh who offered to take him home after the party. Pennebaker stated he and McIntosh left

the party at Jefferson Arms sometime before 11:30 p.m. and went to a nearby bar. Pennebaker testified he and McIntosh drank "two, possibly[y] three" more drinks at the bar. He stated that while they were at the bar, he told McIntosh he had to leave to catch a bus home, and that McIntosh then offered to give him a ride home. When asked if that was the first time that night the subject of McIntosh taking Pennebaker home came up, Pennebaker stated, "[t]hat was the first." McIntosh testified, but declined to answer any questions on constitutional grounds.

An employer may be found vicariously liable for an employee's tort if the employee commits such act while engaged in an activity falling within the scope of employment. *Maryland Casualty Co. v. Huger,* 728 S.W.2d 574, 579 (Mo. App. 1987). An act is considered within the scope of employment if it is: (1) something fairly and naturally incident to business, and, (2) done while engaged in the employer's business. *Id.*

When McIntosh drove Pennebaker to Pennebaker's home in Illinois, he was not acting within the scope of his employment. He was not on duty or engaged in any business for Jefferson Arms. McIntosh was not required to attend the party. He agreed to give a co-worker a ride home after a party and there is nothing in the record, except for the precluded testimony of William McClure, which indicates the building manager suggested McIntosh drive Pennebaker home. There is no evidence McIntosh acted within the scope of his employment as a maintenance worker when he drove Pennebaker home. Point denied.

We affirm.

/s/ Kent E. Karohl
Kent E. Karohl, Judge

Stanley A. Grimm, P.J., & Gary M. Gaertner, J., concur.

APPENDIX B

INSTRUCTION NO. 7

Your verdict must be for Plaintiffs Billy McClure and Effie McClure against Defendant Jefferson Arms if you believe:

First, Plaintiffs Billy McClure and Effie McClure were the natural father and mother of Richard McClure, and

Second, Defendant Jefferson Arms was licensed to sell or supply intoxicating liquor, and

Third, Defendant Jefferson Arms knew or by using ordinary care should have known that Defendant Wilbert McIntosh was intoxicated, and

Fourth, Defendant Jefferson Arms continued to supply intoxicating liquor consumed by Defendant Wilbert McIntosh, and

Fifth, Defendant Jefferson Arms was thereby negligent, and

Sixth, such negligence either directly caused or directly contributed to cause the death of Richard McClure.

The term "negligent" or "negligence" as used in this instruction means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful and prudent person would use under the same or similar circumstances.

M.A.I. 20.01, 19.01 Modified, 11.07
Not in M.A.I.
Carver v. Schafer, 647 S.W.2d 570 (Mo. App. 1983)

Offered by Plaintiffs

/s/ Floyd McBride
Judge

APPENDIX C

Section 537.053, R.S.Mo. 1986

1. Since the repeal of the Missouri Dram Shop Act in 1934 (Laws of 1933-34, extra session, page 77), it has been and continues to be the policy of this state to follow the common law of England, as declared in Section 1.010, R.S.Mo., to prohibit dram shop liability and to follow the common law rule that furnishing alcoholic beverages is not the proximate cause of injuries inflicted by intoxicated persons.

2. The legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Carver v. Schafer,* 647 SW2d 570 (Mo.App. 1983); *Sampson v. W.F. Enterprises, Inc.,* 611 SW2d 333 (Mo.App. 1980); and *Nesbitt v. Westport Square, Ltd.,* 624 SW2d 519 (Mo.App. 1981) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages, rather than the furnishing of alcoholic beverages to be the proximate cause of injuries inflicted upon another by an intoxicated person.

3. Notwithstanding subsections 1 and 2 of this section, a cause of action may be brought by or on behalf of any person who has suffered personal injury or death against any person licensed to sell intoxicating liquor by the drink for consumption on the premises who, pursuant to Section 311.310 R.S.Mo. has been convicted, or has received a suspended imposition of the sentence arising from the conviction, of the sale of intoxicating liquor to a person under the age of twenty-one years or an obviously intoxicated person if the sale of such intoxicating liquor is a proximate cause of the personal injury or death sustained by such person.